2281.

SUPREME COURT OF THE UNITED STATES.

No. 187.

LESSEE OF ISAAC ATKINSON, PLAINTIFF IN ERROR,

vs.

JOHN CUMMINS.

IN ERROR TO THE CIRCUIT COURT UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

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J. & G. S. Gideon, printers.

UNITED STATES OF AMERICA,
Western district of Pennsylvania:

Be it remembered that, at a term of the circuit court of the United States in and for the western district of Pennsylvania, held at the court house, in the city of Pittsburgh, in the county of Allegheny, in and for the said western district of Pennsylvania, in the third circuit, on the third Monday of November, in the year of our Lord one thousand eight hundred and forty-six, before the honorable Robert C. Grier, one of the associate justices of the Supreme Court of the United States, and the honorable Thomas Irwin, district judge of said western district of Pennsylvania, among others were the following proceedings, to wit:

Circuit court of the United States, western district of Pennsylvania.
No. 7, of November term, 1841.

Lessee of ISAAC ATKINSON, a citizen of the State of Ohio,
vs.
WILLIAM STILES, with notice to John Cummins, a citizen of the State of Pennsylvania.

Be it remembered that, on the second day of August, in the year of our Lord one thousand eight hundred and forty-one, Isaac Atkinson, by his attorney, Thomas J. Bigham, esq., comes into court and complains as follows, to wit, that William Styles, late of the district of Pennsylvania, yeoman, a citizen of the State of Pennsylvania, was attached to answer John Smith, a citizen of the State of Ohio, of a plea wherefore the said William Stiles, with force and arms, &c., entered into certain messuages, barns, out houses, &c., one hundred and fifty-six acres of arable land, one hundred and fifty-six acres of meadow land, one hundred and fifty-six acres of pasture land, one hundred and fifty-six acres of wood land, with the appurtenances, situate in Derry township, Westmoreland county, and State of Pennsylvania, and within the western district thereof, and in the jurisdiction of this court, bounded by lands of Jonathan Doty, Robert Thompson, Peter Breniger, ——— Gallagher, John Welsh, William Reed's heirs, and others, which Isaac Atkinson, a citizen of the State of Ohio, had demised to the said John Smith for a term which is not yet expired, and ejected him from said farm, and other wrongs to the said John Smith then did, to the great damage of the said John Smith, and against the peace of the United States; and therefore the said John Smith, by T. J. Bigham, his attorney, complains, whereas the said Isaac Atkinson, on the first day of July, A. D. 1841, at Pittsburgh, and within the district aforesaid, had demised the said tenements, with the appurtenances, to the said John Smith and his assigns, from the first day of July then last past, for and during the full term of ten years from thence next ensuing, and fully to be completed and ended. By virtue of which said demise the said John

Smith entered into the said tenements, with the appurtenances, and became and was thereof possessed for the said term so to him thereof granted.

And the said John Smith, being so thereof possessed, the said William Stiles thereof, afterwards, to wit, on th · tenth day of July, A. D. 1841, with force and arms, &c., entered into the said tenements, with the appurtenances, which the said Isaac Atkinson had demised to the said John Smith, in manner and for the term aforesaid, which is not yet expired, and ejected the said John Smith from his said farm, and other wrongs to the said John Smith then and there did, to the great damage of the said John Smith, and against the peace of the United States; wherefore the said John Smith saith that he is injured, and has sustained damage to the value of three thousand dollars, and therefore he brings his suit.

August 2d, 1841.

Pledges: JOHN DOE,
RICHARD ROE.

Whereupon the following notice was issued and return made thereon:

To John Cummins, a citizen of the western district of Pennsylvania, resident in the county of Westmoreland, tenant in possession of the premises.

I am informed that you are in possession of a claim title to the premises mentioned in this declaration of ejectment, or to some part thereof, and I being sued in this action as a casual ejector only, and having no claim or title to the same, do advise you to appear on the first day of the next term of the circuit court of the United States, for the western district of Pennsylvania, to be holden at Pittsburgh, on the third Monday of November next, and by some attorney of that court, and then and there, by rule of the same court, to cause yourself to be made defendant in my stead. Otherwise I will suffer judgment therein to be rendered against me by default, and you will be turned out of possession. Your loving friend,

JOHN SMITH.

August 2nd, 1841.

Endorsement upon the declaration and notice.

WESTMORELAND COUNTY, *ss:*

Personally appeared before me, a justice of the peace in and for said county, John Brightal, who on his solemn oath said, that this deponent, on the 12th day of August, A. D. 1841, served a true copy of the within declaration in ejectment, and notice annexed, upon John Cummins, tenant in possession; and at the same time this deponent made the said John Cummins acquainted fully with the contents, and explained the intent and meaning of this declaration and notice.

JOHN BRIGHTAL.

Sworn and subscribed this 12th day of August, A. D. 1841, before me. SAMUEL BARNETT.

And afterwards, to wit, on the fifteenth day of November, in the year last aforesaid, John Cummins, the defendant aforesaid, by his attorney, John F. Beavers, esq., appears, asks leave to imparl to the next term, which is granted.

And afterwards, to wit, on the 16th day of November, in the year last aforesaid, John Cummings, by his attorney, John F. Beaver, esq., files the following affidavit of defence, and asks for a rule upon the plaintiff to give security for costs.

Copy of affidavit.

LESSEE OF ISAAC ATKINSON
vs.
JOHN CUMMINS. } No. 7, of November term, 1841.

Ejectment for a tract of land, situate in Derry township, Westmoreland county, 156 acres, more or less.

Affidavit of defence.

WESTMORELAND COUNTY, *ss:*

John Cummins, the above named defendant, on oath states, he hath just defence to the whole of plaintiff's claim in the above suit, and that defendant is the tenant in possession of the land in dispute, claiming the same in his own right.

JOHN CUMMINS.

Sworn and subscribed before me, a justice of the peace in and for the county aforesaid, this 15th day of November, 1841.

THOMAS ARMSTRONG, *J. P.*

Copy of rule.

In the circuit court of the United States, for the western district of Pennsylvania.

LESSEE OF ATKINSON
vs.
STILES, with notice to John Cummins. } No. 7, of November term, 1841. Ejectment.

Rule for security for costs.

And now, to wit, November 16th, 1841, on motion of Mr. Beaver, rule for security for costs.

From the record, E. J. ROBERTS, *Clerk.*

And afterwards, to wit, on the 23d day of February, in the year of our Lord one thousand eight hundred and forty-two, rule returned by the marshal with the following endorsement:

Served by copy given to Mr. Bigham, February 23d, 1842.

T. K. BOSLER, *Deputy marshal.*

And afterwards, to wit, on the 11th day of July, in the year last aforesaid, John Cummins, by his attorney, John F. Beaver, esq., moves the court for judgment of non pros., which was granted, the rule for security for costs not having been complied with.

And afterwards, to wit, on the first day of August, in the year last aforesaid, John F. Beaver, esq., moves the court to set the judgment of non pros. aside, upon condition that security for costs be entered within ten days.

Whereupon, to wit, August the second, in the year last aforesaid, the following stipulation for costs *were* entered and filed:

Copy of paper filed. Judgment of non pros. set aside by the court.

In the circuit court of the United States, for the western district of Pennsylvania.

No. 7 of November term, 1841.

LESSEE OF ISAAC ATKINSON, a citizen of the State of Ohio,
vs.
WILLIAM STILES, with notice to John Cummins, a citizen of the State of Pennsylvania. } Ejectment.

I, R. W. Poindexter, do hereby undertake, that if the plaintiff in the above action shall not pay all the costs which by law and the practice of the court he may be liable to pay, that I will pay the same.

R. W. POINDEXTER.

Taken, acknowledged, and subscribed, the 2d day of August, A. D. 1842, before me,

E. J. ROBERTS, *Clerk*.

And now, to wit, September 12th, 1842, John Cummins, a citizen of the State of Pennsylvania, and defendant in the above suit, by John F. Beaver, esquire, his attorney, comes and defends the force and injury, when, &c., enters into the common rule, confesses lease, entry, and ouster, and says that he is not guilty of the said supposed trespasses and ejectment in the said declaration mentioned, or to any part thereof, in manner and form as the said plaintiff hath above thereof complained against him; and of this the said John Cummins puts himself upon the country, and the plaintiff doth the like.

And whereas afterwards, to wit, June 7th, A. D. 1843, the plaintiff, by his attorney, T. J. Bigham, esq., asks and obtains two rules to take the deposition of witnesses residing within one hundred miles of the city of Pittsburgh, on ten days' notice, to be read in evidence on the trial of the above cause.

For depositions taken, and proceeding had on the above rules, see papers marked A, annexed to this record.

And afterwards, to wit, on the 26th day of September, 1843, the plaintiff, by his attorney, moves for a rule for a commission to take the deposition of witnesses, on fifteen days' notice, on interrogatories filed.

Rule and commission issued; and for proceeding on said commission, see papers marked B, and annexed to this record.

And afterwards, to wit, on the 3d day of October, in the year last

aforesaid, the defendant, by his counsel, asks and obtains a rule for trial at the next term, or non pros.

And afterwards, to wit, on the 30th day of September, 1846, at the instance of Mr. Metcalf, counsel for the plaintiff, Nathaniel Patterson [was] appointed artist, on the part of plaintiff, to trace the lines in dispute, and make return according to rule.

For return of survey agreeable to the foregoing appointment, see diagram, marked C, and appended to this record.

And now, November the 16th, A. D. 1846, the parties in this cause being at issue, a jury being called, came, viz:

David McGonigle, L. P. Hitchcock, David Shields, James Adams, John Ross, Samuel Elder, William Lea, Abraham Mitchell, John H. Shannon, David P. Ingersoll, Alexander Johnston, and Archibald A. Douglass, twelve good and lawful men, who having been duly summoned, returned, ballotted for, empannelled, and sworn to speak the truth, do say, that they find for the defendant.

Verdict rendered on the 18th November, 1846.

During the progress of this trial, A. W. Loomis, esq., one of the counsel for the plaintiff, read the following bill of exceptions, to the admission of certain testimony. Which said bill of exceptions was allowed by the court, and signed, and ordered to be lodged on file.

18th November, 1846. Bill of exceptions.

Case submitted without argument.

18th November, 1846, court charged the jury. Same day jury returned a verdict for the defendant, and on the 30th judgment entered.

Copy of bill of exceptions.

In the circuit court of the United States, western district of Pennsylvania.

RICHARD SMITH, lessee of Isaac Atkinson, a citizen of the State of Ohio,
vs.
WILLIAM STILES, with notice to John Cummins, a citizen of the State of Pennsylvania. } No. 7.

November term, A. D. 1841. Action of ejectment.

Be it remembered, that at the November term, A. D. 1846, of the said court, before the honorable R. C. Grier, an associate justice of the Supreme Court of the United States, and the honorable Thomas Irwin, judge of the said district court, judges holding said court, at Pittsburgh, in said district, the parties in this cause were at issue upon a plea of not guilty in manner and form as the said plaintiff hath thereof in his declaration complained, by said John Cummins, who had entered into and filed in said cause the common consent rule, confessing lease, entry, and ouster, &c., as appears of record in the same; and therefore a jury was called, and regularly and legally empannelled and sworn to try said issue; and on the trial thereof, the plaintiff to prove the same

on his part gave in evidence the record of a judgment in the court of common pleas of Westmoreland county, Commonwealth of Pennsylvania, in favor of Thomas Pumroy, for the use of John Sloan, junior, against George Pumroy, on the fifth day of September, eighteen hundred and twenty, for the sum of four hundred dollars debt and costs, also a writ of fieri facias, issued on said judgment from said court, dated December second, eighteen hundred and twenty, directed to the sheriff of said Westmoreland county, a levy by John Klingensmith, sheriff of said county, of said writ, on all the wright, title, and claim of George Pumroy, of, in, and to a certain tract of land, situate in Derry township, adjoining land of James Henry, Nathaniel Doty, William Reed, William Bell, Robert Thompson, James Wilson, and others, containing 400 acres, more or less, about sixty acres cleared, thirty acres of which is in meadow, having thereon erected a grist-mill, shingle-roofed log dwelling house, shingle-roofed log barn, with an apple orchard thereon growing; and also of such further proceedings in the premises as showed a legal and valid sale by said sheriff of the premises so levied upon, as aforesaid, on the 18th of February, A. D. 1822, to one John Rhey, for the sum of fourteen hundred and one dollars; also a deed from said sheriff to said Rhey, for said premises so levied upon and sold as aforesaid, duly acknowledged in said court on the 9th day of April, 1822; and also evidence that, at the time of said levy and sale, said George Pumroy was the owner of said premises described in the plaintiff's declaration, and sought to be recorded in this action; also a conveyance in fee of said premises by said John Rhey, on the 16th of June, A. D. 1841, to said Isaac Atkinson. And the plaintiff, on said trial, for the purpose of exhibiting and defining what he claimed as embraced in said levy, sale, and conveyance to said Atkinson, as aforesaid, gave in evidence the plot or draft marked on the outside "A, November 18th, 1846," hereto attached, and herewith incorporated as a part of this bill, and claimed before said court and jury that said levy, sale, and conveyance to said Rhey embraced and contained the said land represented in said plot or draft, (by the black lines, embracing 326½ acres, and also 158½ acres, and gave evidence that William Bell and William Reed, two of the persons named as adjoiners of the said 158½ acres, as indicated on said plot or draft,) and not adjoiners of any part of the 326½ acres. The defendant, on the contrary thereof, insisted and claimed that said levy and sale did not embrace or contain any part of the land described in the plaintiff's declaration, (which is the same marked 158½ acres on the plot,) but, on the other hand, was limited and confined to that marked on said plot 326½ acres, &c.; and thereupon, after giving evidence to show that the improvements on the said last mentioned tract of 326 acres, &c., corresponded with the description in the levy, that the tract in dispute contained upwards of one hundred acres of cleared land, with an apple orchard, a shingle-roofed log dwelling house and barn and stable thereon erected, and that the said two tracts were entirely distinct, separate, and disconnected from each other, in order further to prove that said levy and sale did not embrace or contain any

part of the land described in plaintiff's declaration, but, on the other hand, was limited and confined to that marked on plot 326½ acres, called John Kingensmith, esq., late sheriff of Westmoreland county, by whom the levy and sale in the case were made, and proposed to prove by him as follows: That he went to the land of George Pumroy, in 1821, to make the said levy; that the said George Pumroy furnished him with the adjoiners of both tracts; that, upon inquiry of said Pumroy whether the description furnished embraced more than one tract, and learning from him that it covered both, he objected to making the levy in that way; that the said Pumroy acquiescing in his decision, he then struck off, as well as he could, the names given to him as adjoiners, exclusively of the tract in dispute in this action, and supposed that he had stricken them all off; that on the inquisition held upon the levy, endorsed on the fi. fa., the land in dispute was not submitted to the jury, or acted upon by them, but only what was called the mill tract, or, in other words, that upon which the purchaser entered after the sale; that at the sale, upon a representation made to him by some of the bystanders that there was an ambiguity in the description of the land which rendered it uncertain whether one or both tracts were included within it, he stated, in the presence and hearing of John Rhey, that he was selling only the mill tract, and that bidders must govern themselves accordingly; that he made the same representation to Paul Morrow, by whom the property was purchased, as the agent and for the use of said Rhey; that, after the said sale, he was directed to execute the deed to said Rhey, which was accordingly done; that, at the time of the execution thereof, it was again represented, and perfectly understood by both parties, that the property conveyed in said deed embraced only the mill tract, and not the land in dispute; and that at a subsequent period, not very remote from the time of the said sale, upon a representation to him by some of the neighbors that the said Rhey was asserting his claim to the property in dispute under said sale, he took occasion to inquire of him whether the fact was as represented, to which the said Rhey replied that he might have said so in a jocular manner, but that he never intended to claim both tracts, for that he knew that he never bought both tracts, and that he never paid for both tracts, and to claim them now (then) would be too much like putting his hand into another man's pocket and robbing him.

To the admission of which testimony of said Klingensmith proposed to be given by the defendant as aforesaid, the plaintiff objected, and insisted that the same could not be legally admitted for the purpose aforesaid.

Whereupon said court did overrule said objection and admitted said testimony of said Klingensmith so proposed to be given as aforesaid, and the said plaintiff here in court, and during the trial of said cause, excepts to the judgment, opinion, and determination of said court in admitting said testimony; and as the facts aforesaid do not appear of record, the said plaintiff prays that this bill of exceptions may be certified, signed, and sealed by the judges of said court, that the same may become part

and parcel of the record in said case. By the court allowed and ordered to be lodged on file.

R. C. GRIER, [L. S.]
THOMAS IRWIN. [L. S.]

November 30th, 1846, the following agreement filed:

In the circuit court of the United States, western district of Pennsylvania

No. 7 of November term, 1841.

SMITH, lessee of Isaac Atkinson, a citizen of the State of Ohio, vs. WILLIAM STILES, with notice to John Cummins, a citizen of the State of Pennsylvania. } Ejectment.

It is admitted by the parties, that the matter in controversy in this cause exceeds the sum or value of two thousand dollars, exclusive of costs, and that this admission be filed of record.

November 28th, 1846.

BIGHAM & LOOMIS,
Plaintiff's Attorneys.
THOS. WILLIAMS,
Attorney for Defendant.

December 5th, 1846, the following bond, marked D, was filed, and on the 7th December, 1846, approved by the Hon. Thomas Irwin, one of the judges of said court. Same day exceptions to bond filed. And on 12th of same month, new bond, a copy of which is hereto approved and marked E, filed and approved by Justice Irwin, and a writ of error allowed and issued. See paper marked F.

[For map, see original.]

D.

In the circuit court of the United States, for the western district of Pennsylvania.

No. 7 of November term, 1841.

LESSEE OF ISAAC ATKINSON, a citizen of the State of Ohio, plaintiff in error, vs. WILLIAM STILES, with notice to John Cummins, a citizen of the State of Penn'a. } In error.

Know all men by these presents, that I, Matthias B. Rhey, am held and firmly bound unto John Cummins in the sum of one thousand dollars, lawful money of the United States; to which payment, well and truly to be made and done, I bind myself, my heirs, executors, and administrators, firmly by these presents.

Sealed with my seal, and dated this fifth day of December, A. D. 1846.

Whereas the above named Isaac Atkinson has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above suit, in which the said lessee of Isaac Atkinson was plaintiff, and the said John Cummings, defendant.

Now, therefore, the condition of this obligation is such, that if the above named Isaac Atkinson shall prosecute his writ of error with effect, and answer all the damages and costs, if he shall fail to make good his plea, this obligation shall be void; otherwise, to be and remain in full force and virtue.

M. B. RHEY. [SEAL.]

Sealed and delivered in presence of—
R. BIDDLE ROBERTS.

Endorsement upon bond.

LESSEE OF ISAAC ATKINSON vs. JOHN CUMMINS. } No. 7 of Nov. term, 1841. Bond.

Filed Dec'r 5th, 1846; approved 7th Dec'r, 1846. Thos. Irwin, D. judge. Same day, exception to bail filed.

E.

In the circuit court of the United States, for the western district of Pennsylvania.

No. 7 of November term, 1841.

LESSEE OF ISAAC ATKINSON, a citizen of the State of Ohio, plaintiff in error, vs. WILLIAM STILES, with notice to Jno. Cummins, a citizen of the State of Pennsylvania. } In error.

Plaintiff's bond for costs.

Know all men by these presents, that we, Matthias B. Rhey and George Rhey, are held and firmly bound unto John Cummins, defendant in the above case, in the sum of one thousand dollars, lawful money of the United States; to which payment, well and truly to be made and done, we bind ourselves, our heirs, executors and administrators, firmly by these presents.

Sealed with our seals, and dated this eleventh day of December, A. D. 1846.

Whereas the above named Isaac Atkinson has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above suit, in which the said lessee of Isaac Atkinson was plaintiff, and the said John Cummins, defendant.

Now, therefore, the condition of this obligation is such, that if the above named Isaac Atkinson shall prosecute his writ of error with effect,

and answer all damages and costs, if he shall fail to make good his plea, this obligation shall be void; otherwise, to be and remain in full force and virtue.

M. B. RHEY, [SEAL.]
GEORGE RHEY. [SEAL.]

Sealed and delivered in presence of—
R. BIDDLE ROBERTS.

F.

UNITED STATES OF AMERICA, *ss:*

The President of the United States, to the judges of the United States, in and for the western district of Pennsylvania:

Writ of error.

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court before you, between the lessee of Isaac Atkinson, plaintiff, and John Cummins, defendant, a manifest error hath happened to the great damage of the said pl'ff, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first Monday of December next, in the Supreme Court of the United States, to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may correct that error, and do what of right and according to the laws and customs of the United States, should be done.

Witness the hon. Thomas Irwin, one of the judges of the circuit court of the United States, for the western district of Pennsylvania, this twelfth day of December, A. D. 1846, and of the independence of the United States the seventy-first.

E. J. ROBERTS, *Clerk*.

I, Thomas Irwin, one of the judges of the circuit court of the United States, in and for the western district of Penn'a, in the third circuit, having taken and approved the bond of M. B. Rhey and George Rhey, as security of Isaac Atkinson, do allow this writ of error.

Witness my hand and seal, this twelfth day of December, A. D. 1847.

TH'S IRWIN, *D. J.* [SEAL.]

UNITED STATES, *Western dist. of Penn'a, sct:*

The President of the United States, to the marshal of the western district of Pennsylvania, greeting:

Whereas, Isaac Atkinson has this day sued out his writ of error to a certain judgment in a certain action of ejectment recovered against him on the 30th day of November, A. D. 1846, in the circuit court of the United States, in and for the western district of Penn'a, in the third